UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Charles Wolff, Plaintiff, v. New Hampshire Department of Corrections, et al., Defendants.	CIVIL ACTION NO. 06-321-PB

OBJECTION TO MOTIONS

NOW COME the Defendants, by and through their counsel, the Office of the Attorney General, and object to the Plaintiff's two recently filed motions for contempt, Documents 58 and 60, stating as follows:

1. Plaintiff is an incarcerated inmate who has brought this action against the Department of Corrections and a number of its employees and officials on the ground that his civil rights have been violated in contravention of 42 U.S.C. §1983. In particular, Plaintiff claims that he is not being provided with a nutritionally adequate kosher diet.

2. Plaintiff filed a motion for preliminary injunction on July 9, 2007. An evidentiary hearing was held before Magistrate Muirhead on August 2, 2007. The Court issued a provisional Report and Recommendation on August 3, 2007. The order did not find that the food being served to plaintiff was not medically or nutritionally appropriate but instead required the following:

> I therefore order the defendants to respond within twenty (20) days of the date of this Order, and to advise this Court of the following:

(1) What actions the prison and its employees intend to take to evaluate Wolff's present medical condition in light of his intolerance for and reactions to the food he is presently being served; and
(2) How, specifically, the prison and its employees plan to remedy Wolff's situation if it is discovered by the medical personnel that Wolff is not able to tolerate the food presently being provided or offered to him, or that the food does not adequately meet Wolff's particular nutritional needs in light of his medical conditions and religious beliefs.

3. The Defendants filed the requested response to the August 3 provisional order on August 27, 2007. Dkt. # 50. In that response Defendants demonstrated that they have medically evaluated plaintiff's claims to be physically intolerant of the kosher meals currently used. The parties are currently awaiting a ruling from the Court.

4. In the meantime, apart from the two current motions, the Plaintiff has already filed three separate motions to have Mr. Rick Stacy, a DOC staff member who works in the kitchen, held in contempt. *See* Docket No. 53; Docket No. 54 and Docket No. 55. Defendant responded to these motions in Docket No. 59.

5. In the meantime, Plaintiff filed Docket No. 58, which he styles as a Motion "of contempt and disrespect" and advises this Court that Celia Englander, MD prescribed a Vitamin A regime of a 10,000-unit capsule. He claims that the capsule is twice the recommended value. The Department of Corrections disputes this claim. Plaintiff is being prescribed Vitamin A because he is deficient in Vitamin A and dosages for people deficient is entirely different from recommend dosages for persons who are not deficient.

6. Plaintiff also complains that on Saturday, September 22, 2007 he was "served 3 oozing hard boiled eggs and one in solid form." He indicated he forwarded a request slip to the Warden. The Department has previously responded before to his issue with hard-boiled eggs in Docket No. 59. As stated therein, the Department disputes that he has demonstrated any intolerance to eggs or that there is a medical reason that he should not be served eggs. A consult

with an outside nutritionist was sought and was performed on or about August 31, 2007 at CMC. See report attached as Exhibit A. As this report does not specifically address the issue regarding eggs or food allergies, it is counsel's understanding the plaintiff has been re-referred for further evaluation and testing.

7. In Docket No.60, Plaintiff, in another "Motion" reiterates his objection to hard-boiled eggs and alleges that the Department of Corrections is again contempt. He asks for alternative kosher food. Plaintiff does not get to choose what kosher food he eats while in prison. His likes or dislikes of certain food does not create a Constitutional issue.[1] Kahane v. Carlson, 527 F.2d.492, 496 (2nd Cir. 1975).

8. The Defendants object to both of Plaintiff's motions, which are entirely baseless and frivolous, on the same grounds. First, in order to prevail on a motion for contempt, Mr. Wolff would need to establish by clear and convincing evidence that Mr. Stacy or Dr. Englander violated a Court order. *See*, Goya Foods, Inc. v. Wallack Mgmt. Co., 290 F.3d 63, 77 (1st Cir. 2002); AccuSoft Corp. v. Palo, 237 F.3d 31, 47 (1st Cir. 2001). In this case, there has been no court order issued to Mr. Stacy or any other member of the Department of Corrections staff regarding what food Mr. Wolff should be served or what vitamins he should receive. The Court has never ruled that it is unconstitutional for Mr. Wolff to be served eggs. Such an order is highly unlikely, given the factual circumstances of this case. Furthermore, even if the Court had issued an order, it would need to be exceedingly clear and direct, since "any ambiguities or uncertainties in such a court order must be read in a light favorable to the person charged with contempt." Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991); see also Gilday v. Dubois, 124 F.3d 277, 286 (1st Cir. 1997).

---

[1] Plaintiff is now receiving his food in the Unit (cell feeds). Plaintiff just recently complained to the Unit Lieutenant that a prepackaged kosher meal, which was unopened, did not agree with his digestion. He wanted to give it to another inmate. He was told that he could not give it away.

9. Mr. Wolff has been seen repeatedly by the medical staff at the Department of Corrections, and has been sent to an outside dietician for a consult. There has been no confirmation by medical professionals that Mr. Wolff has an allergy to eggs, or any other objective medical condition that would preclude him from eating hard-boiled eggs. He is currently scheduled for other outside medical consults to determine what if any additional medical treatment he requires

10. No separate memorandum of law has been filed with this objection, as the relevant facts and legal authority are cited herein.

WHEREFORE the Defendants respectfully request that the Honorable Court:

A. Deny Plaintiff's Motion for Contempt;

B. Grant any additional relief as is just and proper.

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS, ET AL.

By and through their attorneys,

KELLY A. AYOTTE
ATTORNEY GENERAL

/s/ Nancy J. Smith
Nancy J. Smith, Bar No. 9085
Senior Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3650
nancy.smith@doj.nh.gov

CERTIFICATION OF SERVICE

October 12, 2007

I hereby certify that a copy of the foregoing was mailed this day; postage prepaid, to Charles Wolff, *pro se*, P.O. Box 14, Concord, NH 03302.

/s/ Nancy J. Smith
Nancy J. Smith, Bar No. 9085

Doc: 223844